

**PREPARED TESTIMONY OF DAVID WHITENER, SR CHAIRMAN (1984-1987; 1996-1999) OF THE SQUAXIN ISLAND TRIBE**

**BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS**

**ON SENATE BILL 2283 TO AMEND THE TRANSPORTATION EQUITY ACT FOR THE 21ST CENTURY TO MAKE CERTAIN AMENDMENTS WITH RESPECT TO INDIAN TRIBES**

The Squaxin Island Tribe of Washington State thanks the Senate Committee on Indian Affairs for the opportunity to testify regarding S.2283 and the Indian Reservation Roads Program. Having served two terms as Chairman of the Squaxin Island Tribe and in other elective positions over two decades, as an educator for 35 years, as a participant in numerous tribal negotiations since 1981, and currently as the Transportation Policy Representative for the Squaxin Island Tribe and a Member of the TEA-21 Negotiated Rulemaking Committee, I come to speak to you this afternoon about the importance of the TEA-21 amendments to the Squaxin Island Tribe and throughout Indian country.

Summary of Testimony: The amendments to TEA-21 proposed in S. 2283 would: 1. Exempt the Indian reservation roads program from the limitation on obligations specified at Section 1102(f) of TEA-21. 2. Establish a pilot program for direct funding and oversight by FHWA. Up to 12 Indian tribes per year would be selected to participate in demonstration projects under P.L. 93638 contracts and agreements at the request of the Indian tribes. 3. Clarify that "not to exceed-6 percent" relates to all IRR Program funds available to the BIA for program and project administration and that such amounts are made available to Indian tribal governments at their request under P.L. 93-638 contracts and agreements. Further, the amendment would stipulate that an Indian tribe or tribal organization may commence construction that is funded through a P.L. 93-638 contract or agreement only if the Indian tribe or tribal organization has provided proper health and safety assurances.

The following testimony relates to these provisions of S.2283 and to progress to date on the IRR negotiated rulemaking required by TEA-21.

**6-Percent Limitation for Program and Project Administration**

The Squaxin Island Tribe, along with tribes across the nation, have been frustrated by the failure of the Bureau of Indian Affairs to satisfactorily explain how they expend the "not to exceed 6 percent of contract authority" for program management and oversight. If this were not the case, the majority of tribal statements submitted to the Committee during your oversight hearing on TEA-21 implementation would not have recommended audit of BIA 6-percent expenditures or assumption of the IRR Program by FHWA.

The Squaxin Island Tribe has benefited from project management and oversight expenditures by the Northwest Regional Office over the past five years. Prior to 1995 though, the Tribe received

virtually no benefit. The Northwest Regional Office uses administrative funds to provide program training opportunities, technical assistance, road inventory updates, design services, and coordination with state and local transportation agencies.

Prior to 1995, the only projects completed by the BIA for the Squaxin Island Tribe were to construct one-tenth mile of road in 1982 and chip seal the same road section in 1992. Since then, the Tribe has received funding for transportation planning and in 1999 for bridge rehabilitation and to construct another two-tenths mile of road. The Tribe is currently trying to secure IRR funding to design and build a half-mile access road to a planned 36-unit housing development. Layers of federal agency oversight and bureaucratic delays threatens to cost the Tribe more than \$2 million in lost federal, state, and Tribal funding commitments for the project.

Northwest tribes have watched their share of the IRR national allocation decline from 11% of the total IRR construction program in 1992 to 5.5% for FY 2000. This has resulted for a number of reasons including BIA changes to the allocation formula, a de-emphasis on inventory early in the decade, special treatment by Congress for some regions, and arbitrary use of price indices. The relationship between the Northwest decline and BIA expenditures for project management and oversight is unclear.

Until such time that the BIA can satisfactorily demonstrate to Congress how the Bureau's expenditures for administration of the IRR Program benefits tribes, total administration expenses for the IRR Program should be held within 6 percent consistent with Senate Bill 2283. The Assistant Secretary for Indian Affairs reported to the Committee in December 1999 that the Bureau used an average of 1/6 of its available administrative funds for construction projects over the last seven years. Perhaps the Bureau requires 5 percent rather than 6 percent for program administration, especially in light of the \$3.5 to \$4.0 million of new contract authority the Bureau receives from TEA- 21.

S. 2283 specifies payments for administrative expenses of the IRR Program and the administrative expenses related to individual projects. This is consistent with Resolution No. 0025 of the Affiliated Tribes of Northwest Indians (attached) that was supported by the Squaxin Island Tribe. Our understanding is that administrative expenses as they relate to individual projects are for contract or compact oversight only and not for those project-specific costs such as project development or construction engineering. It is unlikely that these costs could be constrained within 6%, whether the BIA or an Indian tribal government performs the function.

The Squaxin Island Tribe concurs that 6-percent administrative funds are contractible or compactable upon assumption of program or project administrative functions by an Indian tribal government or tribal organization under P.L. 93-638. As a self-governance tribe, the Squaxin Island Tribe has the capability to perform some of these transportation-related functions. (See discussion under Pilot Program)

The Squaxin Island Tribe concurs with the language of Senate Bill 2283 that Indian tribal governments should have the opportunity to assume the first level of review and certification that project plans and specification meet or exceed proper health and safety standards. Requiring both

BIA and FHWA to approve PS&E documents does not increase the likelihood that health and safety standards are met. Final approval of PS&E documents is the responsibility of FHWA unless and until they delegate that function to BIA or an Indian tribal government.

#### BIA Program/Project Administration - A Case History

During FY 1999, the Squaxin Island Tribe saw its first IRR project since 1982 reach the point of obligation. The project for \$250,000 was to rehabilitate an 80-year old functionally obsolete county bridge on the primary access route to the residential area of the Squaxin Island Reservation. The Tribe (not the BIA) first requested that the route be included in the county Transportation Improvement Program in 1994. The county agreed to complete project plans, specifications, and estimates for the bridge. They also agreed to pay the construction cost balance, maintain the bridge, and reconstruct one mile of old highway at a cost of \$1 million.

The BIA proposed to use FY 1997 HBRRP carryover funds to replace the bridge although it was not deficient. FHWA had to require that the project be submitted for rehabilitation. This interagency dialogue delayed the project.

Finally, in late FY 1998, after more than one year of advising the Tribe and the county that funds for the project were available, the Bureau requested that the county execute a contract with the BIA before year-end. The Bureau then submitted its Bridge TIP to FHWA to late for their review and approval. FHWA required the Bureau to resubmit the Bridge TIP for FY 1999. Nothing happened for more than one year and the county was eventually informed that the "contract was lost." The BIA later determined that it was more appropriate to process the project under a grant.

Once the project was approved, Portland sent a control schedule to Albuquerque for data verification. It was then returned to Portland for signatures and back to Albuquerque as a signed TIP. Albuquerque approved the TIP and forwarded it to the BIA Central Office in Washington, D.C. where it languished for months. After "final" approval by BIA, the TIP was forwarded to FHWA in D.C. where apparent calculation errors were identified and the TIP was returned to Portland to start the process anew. Once the TIP was finally approved by FHWA in D.C. it was hung up for several months more until the two agencies could reconcile the TIP with budgets for the carry over amounts from FY1997. BIA said there were funds and FHWA disagreed.

At last, early in FY2000 (the last year in which the funds could be obligated), FY1997 funds for the project that was effectively ready to go from the county's perspective in 1998 were made available to the Northwest Region to obligate. Because of the delays other county projects moved ahead of this one, and construction now will begin in summer 2001.

This is just one example of how the bureaucratic dysfunction of two federal agencies delays Indian reservation roads projects and drives up their costs. Such inefficiency is symptomatic of wasteful use of 6 percent administrative funds and does nothing to contribute to health and safety of users of the IRR System. During this process within the past year there was a fatal collision on one dangerous curve that was to be corrected by this project.

## Pilot Program for Agreements between Indian Tribes and FHWA

Senate Bill 2283 exemplifies the philosophy behind self-governance and self-determination. The Squaxin Island Tribe was one of the first 30 tribes in the nation to partake in the self-governance pilot program with the Bureau of Indian Affairs by executing our first annual funding agreement in 1994. In 1996, the Tribe included funding for Indian Health Services programs under a selfgovernance compact. The program has allowed the Squaxin Island Tribe to truly exercise governance over its programs and more effectively use scarce federal resources.

There are many similarities between the Squaxin Island Tribe's current compacted programs and the IRR Program. At one time, natural resource management, law enforcement, education, and Indian health programs were all BIA administered programs within the Department of the Interior. Indian health services were moved to the Public Health Service within the Department of Health and Human Services. Indian Health Services programs are now compacted by the Squaxin Island Tribe. The Tribe's natural resources programs, law enforcement, and education are currently compacted under self-governance.

Under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), housing funds are now distributed to Indian tribal governments or their designated housing entities as block grants. There are parallels between the Indian Reservation Roads Program and the Indian Housing Block Grant Program that causes us to wonder whether the IRR Program could be more effective if TEA-21 incorporated more NAHASDA-like provisions. Our early steps in managing our own Tribal housing program lead us to believe that we could manage a road construction program with equal effectiveness.

The Squaxin Island Tribe believes that the proposed pilot program within Senate Bill 2283 will promote tribal contracting and compacting directly with the FHWA Federal Lands Highway Program in accordance with P.L. 93-638. It would allow tribes to more fully exercise selfgovernance and self-determination. The Squaxin Island Tribe recommends adoption of these provisions.

## Exemption from Obligation Limitation for the Indian Reservation Roads Program

Under TEA-21, appropriations for the IRR Program have been reduced by nearly \$91 million between FY 1998 and FY 2000 due to the imposition of obligation limitation. The unused funding authorization is redistributed from the IRR Program to the states by TEA-21 Section 1102(0 at the beginning of each fiscal year. The states are generally able to capture their unused funding authorization in subsequent appropriations. The net effect of the change for obligation limitation between ISTEA and TEA-21 was that funding for state highway programs increased by 40% while the increase for Indian reservation roads was limited to 20%. During this period the national composite index for road construction increased by 26% from 108.3 to 136.5. In real dollars, the IRR program was actually funded at a lower level in 1999 than in 1993. (See attached "Federal Funds Apportionment & Obligation Authority Interplay Issue Paper") There is a national consensus within Indian country for removing application of the obligation limitation to the Indian Reservation Roads Program. Several states have joined with Indian tribes and tribal organizations

in requesting that Congress remove the obligation limitation from the Indian Reservation Roads Program. The following attachments are submitted in support of the removal of obligation limitation from the Indian Reservation Roads Program: State of Washington Transportation Commission letter and Resolution No. 600. Resolution No. 99-23 of the Affiliated Tribes of Northwest Indians. Resolution No. 00-25 of the Affiliated Tribes of Northwest Indians recommending amendments to Public Law 105-178, Transportation Equity Act for the 21st Century Senate Bill 2283 would exempt the Indian Reservation Roads Program from the obligation limitation provisions of TEA-21. The Squaxin Island Tribe fully supports this amendment to TEA- 21

#### Progress on the TEA-21 Negotiated Rulemaking for the IRR Program

In October 1999, the Squaxin Island Tribe submitted written testimony to the Committee regarding the implementation of TEA-21. At that time, the tribe was concerned that the Secretary of Interior had "failed to establish a process leading to meaningful negotiation or that will ever deliver a funding formula and regulation for Indian reservation roads." Although the Rulemaking Committee has made significant progress in the past eight months, the Tribe retains its concerns regarding the final outcome of the process and the intentions of some participants. The status of the concerns and recommendations we expressed in October 1999 are as follows:

1. The Bureau abandoned its intent to distribute FY 2000 funds in the same manner as in 1998 and 1999. The tribes negotiated a recommendation to distribute funding for FY 2000 based on the pre- existing relative need formula, the dedicating \$18.3 million in special appropriations for small tribe capacity building and IRR bridges, and correcting problems with BIA price index correction in formula for non-reporting states -Alaska and Washington.
2. There is still a prevalent attitude among many of the federal officials that they can continue to use the fiscal year 1999 formula to allocate funding for the IRR Program rather than develop a new formula. This attitude could be no more evident than at a meeting of the funding formula work group meeting in June 2000 at which seven of the twelve BIA Regional Roads Engineers continued to push for continued use of the existing formula. No other group involved in the negotiations has a greater vested interest in the existing formula than the Regional Roads Engineers.
3. At the beginning of the TEA-21 negotiations tribal representatives expressed a strong sense of concern and indignation at the process of developing Organizational Protocols for the Committee that the federal representatives were not participating with the authority to negotiate or make final decision on behalf of the federal agencies. The tribes were concerned that the BIA and FHWA would not accept the product of negotiations if it strayed to far from what the agencies envisioned for the program. Then in May 2000 in announcing a proposed distribution of FY 2000 funds the BIA chose to ignore a Tribal Caucus recommendation for correcting for the price index non- reporting states, a recommendation that was supported by the federal representatives in Full Committee, and to proceed to use a methodology developed by the BIA for the correction and that did not have consensus support of the Tribal Caucus. The impact on the Northwest Region's allocation of funds was a reduction of \$1 million. This follows a steady decline in funding for the Northwest from 11% of the IRR funding in 1992 to 5.5% for FY 2000. No other region of the country has sustained such a severe reduction in the share of funding as the Northwest.
4. In October 1999, the Squaxin Island Tribe expressed concern that the makeup of the rulemaking committee was

inconsistent with the requirements of TEA-21. While this concern continues to prevail in regard to consensus agreement on a final regulation and formula, the existing Committee has demonstrated that it can negotiate, compromise, and reach consensus on some important aspects of the regulation<sup>5</sup>. In October 1999, the Squaxin Island Tribe expressed concern that the makeup of the rulemaking committee was inconsistent with the requirements of TEA-21. While this concern continues to prevail in regard to consensus agreement on a final regulation and formula, the existing Committee has demonstrated that it can negotiate, compromise, and reach consensus on some important aspects of the regulation<sup>6</sup>. In October 1999, the Squaxin Island Tribe expressed concern that the makeup of the rulemaking committee was inconsistent with the requirements of TEA-21. While this concern continues to prevail in regard to consensus agreement on a final regulation and formula, the existing Committee' has demonstrated that it can negotiate, compromise, and reach consensus on some important aspects of the regulation.

#### Relative Distribution of IRR Funds (table not transmittable)

7. Indian reservation roads comprise 2.63% of the public highway system in the nation, yet these roads continue to receive less than one percent of the annual highway allocation. An increase in actual funding for TEA-21 of 20% failed to keep pace with a rate of inflation of 26% for a composite of all road construction costs. The transportation authorization's failure to keep the IRR program even with state programs was primarily the result of the first-time application of obligation limitation to the IRR Program. Had this not occurred the IRR Program would have grown at the same rate as state programs; although, the Program would have move no closer to parity with state programs<sup>8</sup>. Road maintenance funding for IRR continues to lag even further behind that of the states resulting in a disproportionately high share of IRR construction funding going toward deferred maintenance rather than new construction. The IRR system will continue to deteriorate rapidly in relation to state and local roads as long as state programs continue to receive up to ten times more funding per mile for road maintenance as does the IRR Program. Either the Interior appropriation for road maintenance need to be increased or an alternative funding source developed<sup>9</sup>. If the Bureau of Indian Affairs continues to frustrate the process of negotiated rulemaking or fails to adopt consensus recommendations for the regulation and formula, it continues to be the recommendation of the Squaxin Island Tribe that the IRR Program be transferred to the Federal Highways Administration for funding and oversight. We would propose that any new transportation authorization act for the IRR Program be patterned even more closely after the Native American Housing Assistance and Self-Determination Act of 1996 than it is under TEA-21. NAHASDA is working extremely well for housing construction and an equivalent measure could work equally well for road construction.